

AGREEMENT

THIS AGREEMENT ("Agreement") dated _____, 2005 ("Effective Date") is made by and between Pacific Bell Telephone Company, a California corporation doing business as SBC California ("SBC California") and City of Walnut Creek, a municipal corporation ("City"). SBC California and City shall sometimes be referred to separately as a "Party," and collectively as the "Parties."

RECITALS

A. As a telephone corporation, SBC California has ~~a statewide franchise~~ certain rights under Public Utilities Code § 7901 ("Section 7901") to construct, operate and maintain its ~~telecommunications facilities~~ telephone lines for the purpose of providing telephone service in the public rights of way ("ROW") throughout the state of California without having to obtain a local franchise or pay franchise fees.

B. SBC California is in the process of upgrading its existing telecommunications network to provide an integrated Internet Protocol ("IP") enabled broadband platform of voice, data and video services ("IP Network"), the video component of which is a switched, two-way, point-to-point and interactive service ("IP-enabled Video Service"). The IP Network upgrade will involve the use of the City's ROW.

C. SBC California believes that Section 7901 covers the construction, operation and maintenance of the IP Network, and that SBC California is not required to obtain a franchise or other authorization from the City to offer IP-enabled services including IP-enabled Video Services within the City limits over the IP Network.

D. SBC California further believes that City's right to regulate the construction of the IP Network in City's ROW is limited to time, place, and manner considerations.

E. City believes that the provision of IP-enabled Video Services by SBC California is beyond the scope of Section 7901 and is subject to City's local franchising authority.

F. Both Parties agree that the deployment of the IP Network and the provision of IP-enabled Video Services should not be delayed by litigation to establish the scope of Section 7901 or the application of the City's franchise ordinance to IP-enabled Video Services.

G. City and SBC California further agree that litigation to resolve this issue would be complex and protracted, and that it is in the best interests of both Parties and the residents of City to reach a compromise of each other's positions and claims.

NOW, THEREFORE, in consideration of and reliance upon the respective *representations, promises, concessions, terms and conditions contained herein*, City and SBC California agree as follows.

1. Term. The term of this Agreement shall be for five (5) years from the Effective Date of this Agreement ~~through the end of 2008~~. The term may be extended upon mutual agreement of the Parties. In the event that SBC California continues to provide IP-enabled Video Services or any other video programming (collectively "Video Services") within the City following the end of the term, this Agreement shall be deemed to continue on a month-to-month basis unless and until (1) the parties agree to extend, modify or terminate this Agreement, or (2) SBC California discontinues providing Video Services within the City, or (3) the City provides thirty (30) days written notice of termination. Upon termination of this Agreement, SBC California shall immediately discontinue providing Video Services.

2. Compensation to City. During the term of this Agreement, SBC California shall ~~remit pay to City a fee not to exceed of 5% of the gGross Rrevenues, from subscription fees collected from each subscriber to SBC California's IP-enabled Video Services product delivered over the IP-enabled communications network in the City's rights of way; such product to be defined by SBC California when it is offered to the public.~~ For the purposes of this Agreement, Gross Revenues shall mean all gross revenue derived directly or indirectly by SBC California or any affiliate thereof arising from or attributable to, the provision of Video Service within the City. Gross Revenues shall include, but shall not be limited to, revenue from (i) payments for service, equipment, late fees, and other charges, including without limitation all payments directly or indirectly from Subscribers; (ii) advertising carried on the Video Service; and (iii) programmers or others relating to transmissions carried as part of the Video Service, including but not limited to payments to carry programming and home shopping revenues.

The fee does not apply to non-video revenues or the non-video revenues of a bundled product containing IP video and non-video offerings. In the event that the Operator shall, during the term of the Franchise, bundle, tie or combine Video Services (which are subject to the fee) with non-Video Services (which are not subject to the fee), for purposes of calculating the fee the combined revenue therefrom shall apportioned in accordance with proportion that the charges for each of the services if provided separately bears to the total charges for the bundled services if provided separately.

Nothing herein shall prohibit ~~the fee will be from~~ being identified and passed through on any subscriber bill by SBC California, provided the fee is not characterized on the bill as a fee or tax on the subscriber as opposed to a cost borne by SBC California, and all such

The fees collected ~~will be forwarded~~ shall be paid to City quarterly on the last day of each quarter after collection. Each payment shall be accompanied by a report in such form as the City may reasonably request showing the computation of the fee for the preceding quarter. Upon thirty (30) days prior written notice, the City shall have the right

to conduct an independent audit of SBC California's records for the purpose of determining proper payment of the fee. If such audit indicates an underpayment of two percent (2%) or more, SBC California shall assume all reasonable costs of such an audit and shall remit to the City all applicable fees due and payable. In the event that any fee is not made on or before the dates specified in this Agreement, SBC California shall pay as additional compensation only a late payment fee computed from such due date, at an annual rate equal to the lesser of the maximum rate permitted by law or 18% per annum during the period for which payment was due. Nothing in this Agreement shall be construed to limit any authority of the City to impose any tax, fee, or assessment of general applicability. The payments required by this section shall be in addition to any and all taxes of a general nature or other fees or charges which SBC California shall be required to pay to the City or to any state or federal agency or authority, as required herein or by law.

3. Public, Educational and Governmental Programming. SBC California will carry City's noncommercial, public, education and government (PEG) programming made available and delivered by City to SBC California ~~in a format consistent with SBC California's IP-enabled communications network.~~ Upon initial activation of any Video Service, SBC California shall dedicate five (5) channels (the "PEG Channels") for the exclusive use of the City or its designees in its sole discretion for public, educational or governmental access purposes. Upon initial activation of any Video Service, SBC California shall provide dedicated, bidirectional fiber optic links between SBC California's headend or other insertion point and City Hall for the City's exclusive use. SBC California shall also provide all equipment and services necessary to transport and format video programming over these fibers and shall place these PEG access channel signals onto its system. SBC California shall place these channels on the Basic Service Tier in channel positions that are contiguous with, and not separated by other channel numbers from, the other channels located on the Basic Video Service tier. Each PEG access channels shall be delivered to all subscribers with signal quality at least as good as the NTSC standard and at least as good as every other channel provided on the Video system using the same converters and signal equipment that is used for other Basic Service Tier channels. SBC California shall not change the channel assignment for the PEG Access Channels without the prior written approval of the City, unless required by federal law. In addition to any other payment made to the City, SBC California shall pay the City a PEG Access Capital Payment in the initial amount of \$160,000 within eighteen months of the effective date of this Agreement, with additional PEG Access Capital Payments in the amount of three percent (3%) of its Gross Revenues. The PEG Access Capital Payment shall be paid quarterly at the same time and using the same calculations and rules as the calculation and payment of Franchise Fees. PEG Access Capital Payments may be used for PEG Access and Institutional Network capital purposes at the sole discretion of the City.

4. Institutional Network ("I-Net"). **[Please note that the City is willing to delete this section in exchange for enhancements to PEG access capital funding.]** SBC California shall, concurrent with construction of the remainder of the IP Network, construct and dedicate to the City for public agency and non-profit use an I-Net

consisting of six (6) optical fibers. The I-Net shall be a bidirectional, fully fiber-optic network designed and constructed with single mode fiber, in a design so that each I-Net site can originate and receive fully interactive video, data and voice signals upon initial activation of the Video System. The I-Net should include all equipment acceptable to the City necessary to provide the foregoing functionality. The I-Net fibers shall be terminated at each building specified by the City, not to exceed 27 sites. SBC California shall maintain the fiber according to highest standard provided for any of its customers. All costs of construction, operation, equipment and maintenance shall be fully borne by SBC California. Upon completion of construction, SBC California shall test the I-Net, make any necessary corrections and provide the test results to the City.

45. Emergency Message. SBC California will retransmit emergency alerts on its IP-enabled Video Services consistent with federal standards and in the event the City declares a public safety emergency. In addition to complying with federal requirements for an emergency alert system, the Video Services network shall be designed and constructed to permit the City to simultaneously override audio and video signals and broadcast emergency messages on all channels on the Video System. The City shall be given the capability to initiate emergency messages from City Hall, or such other place as the City may designate. SBC California shall assist the City in periodic testing of the emergency notification system.

56. Customer Service. SBC California will comply with, and the City may enforce, the customer service requirements ~~consistent with specified in 47 C. F. R. Section 76.309(c) until there are two or more providers offering video services, excluding direct-to-home satellite service in the City.~~

67. Obligations of City. During the term of this Agreement City will not attempt to nor subject the provision of SBC California's IP-enabled Video Services over the IP Network to regulation under its cable television franchise ordinance or similar ordinance. In addition:

(a) City agrees to subject the construction and installation of the IP Network to the same process and review as it subjects the installation and construction of SBC California's existing telecommunications infrastructure, except to the extent that unique aspects or the overall magnitude of the project reasonably necessitate the use of different procedures.

(b) City agrees not to block, restrict, or limit the construction and installation of the IP Network other than applying time, place and manner requirements.

(c) City agrees to process any and all applicable permits for the installation, construction, maintenance, repair, removal, and other activities associated with the IP Network in a timely and prompt manner consistent with applicable law.

(d) Notwithstanding the foregoing, the City reserves all rights to exercise its authority over the time, place and manner of the installation, construction,

maintenance, repair and removal of the IP Network., together with all rights and powers not specifically limited by this Agreement.

78. Indemnification.

(a) SBC California agrees to indemnify, defend, and hold harmless City, its officers, officials, agents, volunteers and employees, from and against any liability, claims, actions, causes of action or demands whatsoever against any of them, including any injury or death of any person or damage to property or other liability of any nature, arising out of or in any way connected with the performance of this Agreement or the ~~for damages and for any liability or claims resulting from tangible property damage or bodily injury (including accidental death), to the extent proximately caused by SBC California's negligent construction, operation, or maintenance of its~~ the IP Network., provided that City shall endeavor to give SBC California written notice of its obligation to indemnify City within ~~ten thirty~~ (130) days of receipt of a claim or action pursuant to this subsection. Notwithstanding the foregoing, SBC California shall not indemnify City for any damages, liability or claims resulting from ~~the negligence or willful misconduct of City, its officers, agents, employees, attorneys, consultants, independent contractors or third parties or for any activity or function conducted by any person or entity other than~~ SBC California in connection with PEG programming.

(b) With respect to SBC California's indemnity obligations set forth above, SBC California shall provide the defense of any claims brought against City by selecting counsel of SBC California's choice to defend the claim, subject to the consent of City, which shall not be unreasonably withheld. Nothing herein shall be deemed to prevent City from cooperating with SBC California and participating in the defense of any litigation by its own counsel at its own cost and expense, provided, however, that after consultation with City, SBC California shall have the right to defend, settle or compromise any claim or action arising hereunder, and SBC California shall have the authority to decide the appropriateness and the amount of any such settlement. In the event that the terms of any such settlement do not include the release of City and City does not consent to the terms of any such settlement or compromise, SBC California shall not settle the claim or action, ~~but its obligation to indemnify City shall in no event exceed the amount of such settlement.~~

(c) City shall ~~hold SBC California harmless and shall be responsible for~~ damages, liability or claims resulting from the sole negligence or willful misconduct of City.

(d) ~~City shall be responsible for its own acts of negligence or willful misconduct, or breaches of obligation committed by City for which City is legally responsible, subject to any and all defenses and limitations of liability provided by law.~~ SBC California shall not be required to indemnify City for acts of City which constitute willful misconduct or sole negligence on the part of City, its officers, employees, agents, attorneys, consultants, or independent contractors ~~or third parties.~~

9. Insurance.

A. Insurance Required: SBC California shall maintain throughout the entire term of this Agreement at its own cost and expense and keep in full force and effect the following insurance covering SBC California, and by additional insured provision, the City. Coverage must be placed with an insurance company/companies licensed authorized to do business in the State of California.

B. Minimum Scope of Insurance: Coverage shall be at least as broad as:

1. Insurance Services Office number GL0002 (Ed. 1/73) covering Comprehensive General Liability and Insurance Services Office form number GL 0404 covering Broad Form Comprehensive General Liability; or Insurance Services Office Commercial General Liability coverage ("occurrence" form CG 0001). The policy must include coverage for Contractual Liability, Premises and Operations, Independent Contractors, Broad Form Property Damage, Personal Injury, and Products and Completed Operations. The policy must also include coverage for the explosion, collapse and underground hazard.

2. Insurance Services Office form number CA 0001 (Ed. 1/78) covering Automobile Liability, code 1 "any auto" and endorsement CA 0025.

3. Workers' Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance.

4. If SBC California should engage in programming origination of any kind, including production of advertising, SBC California shall obtain Broadcasters' Liability Coverage, covering errors and omissions and negligent acts and other operations of SBC California, committed during the term of the Franchise period with the City. SBC California shall provide a one-year discovery period under this policy.

C. Minimum Limits of Insurance: SBC California shall maintain policy limits of no less than:

1. General Liability: \$2,000,000 combined single limit per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.

2. Automobile Liability: \$2,000,000 combined single limit per accident for bodily injury and property damage.

3. Worker's Compensation and Employers Liability: Worker's compensation limits as required by the Labor Code and Employers Liability limits of \$1,000,000 per accident.

4. Broadcasters': One million dollars (\$1,000,000) per claim if required above.

The City may review these amounts no more than once a year and may require reasonable adjustments to them consistent with the public interest, any increases not to exceed the Consumer Price Index for the San Francisco-Oakland-San Jose Metropolitan Area for the prior 12-month period since the prior review, or the Effective Date, as applicable.

D. Deductibles and Self-Insured Retentions: Any deductibles or self-insured retentions must be declared to and approved by the City. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, officials, employees and volunteers; or SBC California shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses.

E. Other Insurance Provisions: The policies shall contain, or be endorsed to contain, the following provisions:

1. General Liability and Automobile Liability Coverages.

a. The City, its officers, officials, employees, agents and volunteers are to be covered as insured as respects: liability arising out of activities performed by or on behalf of SBC California; products and completed operations of SBC California; ; premises owned, occupied or used by SBC California; or automobiles owned, leased, hired or borrowed by SBC California. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, officials, employees, agents or volunteers acting within the performance of the official duties of the position and not resulting from malfeasance in office, willful neglect of duty or bad faith.

b. SBC California's insurance coverage shall be primary insurance as respects the City, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, agents or volunteers shall be excess of SBC California's insurance and shall not contribute with it.

c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officers, officials, employees, agents or volunteers.

d. SBC California's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

1. Worker's Compensation and Employers Liability Coverage. The insurer shall agree to waive all rights of subrogation against the City, its officers, officials,

employees and volunteers for losses arising from work performed by SBC California for the City.

2. All Coverages. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, cancelled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

F. Acceptability of Insurers: Insurance is to be placed with insurers with a Best's rating of no less than A:VII.

G. Verification of Coverage: SBC California shall furnish the City with certificates of insurance and with original endorsements effecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. All certificates and endorsements are to be received and approved by the City before work commences. The City reserves the right to require complete certified copies of all required insurance policies, at any time.

108. Breach of Agreement. Should either party claim that a breach of any part of this Agreement has occurred, that party will provide prompt written notice to the other, specifying the nature of the breach; and upon receipt the other party shall cure such breach within 60 days.

119. Dispute Resolution. Except as otherwise provided in this Agreement, the Parties shall make diligent good faith efforts to resolve all issues and disputes that arise in the administration of this Agreement through discussions between designated representatives of the Parties, and use of a mediator when such discussions have failed

120. Notices. Any notice to be given under this Agreement shall be in writing and may be delivered to either personally, by facsimile or by certified or registered mail with postage prepaid and return receipt requested, addressed as follows:

If to City:

City of _____Walnut Creek

Attn: City Attorney's Office

1666 N. Main St.

P.O. Box 8039

Walnut Creek, CA 94596

If to SBC California: SBC California

Attn:

134. Modification. This Agreement may be amended or modified only by a written instrument executed by both Parties.

142. Assignment. SBC California may assign or transfer this Agreement or any interest therein, to any affiliate of SBC California without the prior consent of City, provided that such a transfer does not result in a change in working control of the IP Network.

153. Entire Agreement. This Agreement constitutes the entire agreement between City and SBC California with respect to the subject matter contained herein and supersedes all prior or contemporaneous discussions, agreements, and/or representations of or between City and SBC regarding the subject matter hereof.

164. Waiver. Failure on the part of either Party to enforce any provision of this Agreement shall not be construed as a waiver of the right to compel enforcement of such provision or any other provision.

175. Miscellaneous.

(a) SBC California and City each hereby warrants that it has the requisite power and authority to enter into this Agreement and to perform according to the terms hereof.

(b) The headings used in this Agreement are inserted for convenience or reference only and are not intended to define, limit or affect the interpretation of any term or provision hereof. The singular shall include the plural; the masculine gender shall include the feminine and neutral gender.

(c) SBC California and City shall cooperate fully with one another in the execution of any and all other documents and in the completion of any additional actions including, without limitation, the processing of permits that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

(d) Nothing contained in this Agreement is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the Parties hereto toward any person or entity not a party to this Agreement, unless otherwise expressly set forth herein.

(e) Time is of the essence in the performance of this Agreement.

(f) This Agreement shall be governed by the laws of the State of California. Any action to enforce or interpret this Agreement may only be brought in Superior Court of California, County of Contra Costa, or in the event of a "federal question", in District Court for the Northern District of California.

(g) Pursuant to Section 107.6 of the Revenue and Taxation Code, the City hereby advises, and SBC California recognizes and understands, that this Agreement does create a possessory interest subject to property taxation and that it will be subject to the payment of property taxes levied on such interest.

(h) SBC California shall construct infrastructure necessary to provide the Video Service to pass every dwelling unit within the City and shall extend Video service to any residence upon request unless the City grants an exemption from this requirement in writing. The initial construction of the infrastructure necessary to provide the Video Service shall be completed no later than two years after the effective date of this Agreement.

186. Binding Effect. This Agreement shall be binding upon and for the benefit of each of the Parties and their respective past and present principals, managers, City Council members, offices, directors, shareholders, agents, employees, attorneys, successors and assigns and any parents, subsidiaries or affiliated corporations or entities, as applicable.

197. Counterpart Execution. This Agreement may be signed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same agreement. Signature pages may be transmitted by facsimile and any signature transmitted by facsimile will be given the same force and effect as an original signature.

IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives, have executed this Agreement and made the same effective as of _____ ("Effective date").

SBC CALIFORNIA

By: _____
Name: _____
Title: _____

CITY

By: _____

Name: _____

Title: _____